

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

EARL MITCHELL, JR.,

Petitioner,

V.

**ROBERT HOUSTON, Director
Nebraska Dept. of Correctional
Services,**

Respondent.

CASE NO. 4:09CV3174

MEMORANDUM AND ORDER

Petitioner has filed a Petition for Writ of Habeas Corpus under [28 U.S.C. § 2254](#) (Filing No. [1](#)), a Motion for Leave to Proceed In Forma Pauperis (IFP) (Filing No. [3](#)), and a certified copy of his trust account information (Filing No. [8](#)).

Habeas corpus cases attacking the legality of a person's confinement require the payment of a \$5.00 fee. [28 U.S.C. § 1914\(a\)](#). The court has reviewed the Motion for Leave to Proceed IFP pursuant to [28 U.S.C. § 1915\(a\)\(1\)-\(2\)](#).¹ Petitioner's trust account statement shows that he had an average monthly balance of \$100 or more in his account for the six-month period immediately preceding the filing of the Petition. (Filing No. [8](#)) For this reason, the court concludes that Petitioner must be required to pay the \$5.00 filing fee because he has the financial ability to do so.² See [28 U.S.C. § 1915\(a\)](#).

¹The court recognizes that the provisions of [28 U.S.C. § 1915\(b\)](#) do not apply to habeas cases. See [Malave v. Hedrick](#), 271 F.3d 1139, 1139-40 (8th Cir. 2001).

²The court notes a filing fee in the amount of \$5 was received in this case on August 12, 2009, but was returned because the Petition had not yet been filed and the Clerk of the court cannot accept filing fees without pleadings. (See [Docket Sheet](#).)

IT IS THEREFORE ORDERED that:

1. Petitioner's Motion for Leave to Proceed IFP (Filing No. [3](#)) is denied;
2. Petitioner is granted until October 1, 2009, to pay the \$5.00 filing fee. Petitioner is warned that if the fee is not paid as required, the court may dismiss this case without further notice; and
3. The Clerk of the court is directed to set a pro se case management deadline in this case using the following text: October 1, 2009: deadline for Petitioner to pay \$5.00 filing fee.

Dated this 1st day of September, 2009.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

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